Central Law Journal.

ST. LOUIS, MO., JUNE 12, 1914.

THE RULE OF DAMAGES IN MARITIME DISASTER WHERE A SINGLE VESSEL IS INVOLVED.

The ruling by our Supreme Court that the owners of the Titanic could file a petition for limitation of liability under our statute, notwithstanding there was no other vessel of a different nation involved, appears to us to carry into maritime law a principle having no counterpart or similitude in other law. And we wonder it was decided in so brief an opinion. Ocean Steamship Navigation Co. v. Mellor et al. 34 sup. Ct. —, McKenna, A. J., dissenting.

The opinion by Justice Holmes states that the general proposition that a foreign ship may resort to the courts of the United States for a limitation of liability under our statutes is established by The Scotland and La Bourgogne cases. It was admitted, however, that these and other cases concerned collisions between vessels of different countries and in The Scotland case, the elder case of all of them, Mr. Justice Bradley said in effect that if a collision occurred on the high seas between vessels of the same nationality the law of their flag would govern.

Justice Holmes says: "It is true that the act of Congress does not control or profess to control the conduct of a British ship on the high seas. It is true that the foundation for a recovery for a British tort is an obligation created by British law. But it also is true that the laws of the forum may decline altogether to enforce that obligation on the ground that it is contrary to the domestic policy or may decline to enforce it except within such limits as it may impose. It is competent, therefore, for Congress to enact that in certain matters belonging to admiralty jurisdiction, parties resorting to our courts shall recover only to such extent or in such way as it may mark it. The question is not whether the owner of the Titanic by this proceeding can require all claimants to come in and can cut down rights vested under English law. It is only whether those who do see fit to sue in this country are limited in their recovery irrespective of the English law."

We could better understand this rule of comity were claimants seeking to enforce against property in this country a right of action based on British law—though even then the point would not be without difficulty. But we do not see how British law may be rejected and American law applied to "the conduct of a British ship on the high seas," when the opinion says Congress had no such intention. Either the British law should have been enforced or claimants sent to the British court, because their law is contrary to our policy.

How, however, may it be said that British law is contrary to our policy, when the only policy we have on this subject is as concerns a collision between vessels of different nationalities?

This sort of legislation has a legitimate field, because the United States may prescribe as to this as well as may another nation, and it would not be strange that it would be different in different countries. It does not seem that such legislation has any sort of inference in it against what a particular nation may prescribe in regard to torts by its own registered vessels.

If the British act does, as we understand it does, make the owner of the vessel liable for a tort, how can that be supposed contrary to our policy, when we have such abundance of legislation of this very kind in our law.

But, then, there seems another reason why the British law should be enforced not as "in a maritime case," but under a right given by British statute. It is all right to call recovery under the act of Congress a maritime right, but when a country is legislating as to liablity of its own craft, it thus may be legislating as to them whether on the high seas or in inland bays. The law simply calls their acts torts and affixes responsibility therefor.

When suit is brought in this country upon a British statute, it is not of the natural jurisdiction of a Federal court, but it ought to be there only for diversity of citizenship, and for this reason the federal statute as to limitation of liability would seem not to apply.

Congress it is true might prescribe the rule it has made as to acts of its own registered vessels upon the high seas, that is to say, making the salvage liable for acts of a vessel, but when another nation does the same as to its vessels, it does not seem to be a maritime law at all. It might be such where it attempted to say what should be the liability in collisions between vessels of its own nationality with those of another nationality. The federal courts entertaining or not suits by way of comity is a new sort of thing in this country, unless they are acting *pro hac vice* the state courts.

NOTES OF IMPORTANT DECISIONS.

JOINT TORTFEASORS — RELEASE BY ONE WITH STIPULATION THAT IT SHALL NOT RELEASE THE OTHERS.—The Florida Supreme Court holds that a stipulation in a release of one joint tortfeasor that the others shall remain bound does not prevent it operating their discharge. Louisville & N. R. Co. v. Allen, 65 So. 8.

Decision is in conflict upon this question, the cases holding the other way regarding the stipulation merely as a covenant not to sue.

Whether such a release should operate as a discharge of the other joint tortfeasors it seems to us should depend upon whether the one specifically released would be liable to contribution by any other who being sued paid the judgment, as the party principally responsible and having himself no right to contribution from any of the others. If the party settled with could not be sued for contribution by the others, it would seem he ought to be allowed to buy his peace from litigation —especially if he could sue the others for the full amount for any judgment rendered against him.

Even where he may have contribution what harm is done, if the amount paid could be taken in reduction of damages. Still it must be admitted that defendant ought to have some other way of claiming the reduction that when the case is on trial, but should be allowed to show it to the court after verdict has been rendered. Statute ought to provide for this.

The Florida court thinks "the numerical weight of authority" is on its side in this question, but this we very greatly doubt and think the opposing cases accord more nearly with the tendency of modern decision.

APPEAL AND ERROR—REMITTITUR IN VERDICTS WHERE EXCESS IS NOT EXACTLY CALCULABLE.—The Supreme Court of Appeals of West Virginia holds that when unwarranted and excessive damages are found by the jury, it is error for the court to suggest and allow a remittitur as to part of the damages, when no data in the evidence afford a basis for same, and thereupon deny a new trial. Hall v. Philadelphia Co., 81 S. E. 727.

The facts in this case show that plaintiff was being supplied with natural gas furnished free for domestic use, under an oil and gas lease from a well bored on his land under the lease. In consequence of a dispute as to what came within domestic use, the company cut off plaintiff's supply during zero weather for thirty-six hours. He recovered a verdict for $500 and the court required a remittitur of $250 as a condition to refusal of new trial.

The Supreme Court of Appeals said: "There was absolutely no data on which a remittitur could be made. Under similar circumstances this court held that 'it is error in the court to allow plaintiff to elect to take a less sum suggested by the court, when there are absolutely no data before the court by which said smaller sum could be rightly and definitely ascertained, but which is fixed by the discretion of the court unaided by evidence.'"

Many cases on this subject are considered in a leading article in 70 Cent. L. J. 438, where

it is shown that in unliquidated damages cases, where the verdict is supposed to represent the enlightened conscience of the jury in their experience as practical men, the courts seemed divided on the right to direct a remittitur, and again divided as to prejudice and passion cases.

This West Virginia case would appear to involve the principle, that a trial judge or an appellate court ought to have the right to order a remittitur and refuse a new trial and not condition its order at all.

But how in any case of unliquidated damages it could touch the verdict at all, unless it was thought to be the outcome of prejudice and passion, we cannot see, and when it is thus, there would seem no course left but to grant a new trial. In this view every case in tort should be set aside where the amount is according to the experience of jurors in life, and in other cases there should be no remittitur nisi at all. In other words, the rule of remittitur nisi, generally speaking, would seem to be wrong.

CRIMINAL LAW—PRESUMPTION OF COERCION BY HUSBAND WHERE CRIME IS COMMITTED BY WIFE IN HIS PRESENCE.—We annotated a case by Supreme Court of New Jersey on the subject of the presumption of coercion over wife as to crime committed by her in his presence. 72 Cent. L. J. 139. There the authorities seemed to show that this presumption was prima facie only. Later we called attention to an Iowa case holding that there was no rule of presumption where the offense charged was the keeping of a bawdy house, id. 262. Now appears a case by North Carolina Supreme Court which declares that this was "but a rule of evidence, established by the courts for the protection of married women at a time when they could not testify for themselves," and it is not suited to modern conditions. State v. Seaton, 81 S. E. 687.

This case bears some resemblance to the Iowa case where there was an exception held to exist at the common law—the offense charged being the selling of intoxicating liquor by a husband and wife, keepers of a house of questionable repute, at the house.

The chief justice, in concurring, speaks of the old presumption not comporting with the twentieth century conditions, but it was "just and proper, when the husband could thrash her at will;" but "the courts have advanced from that barbarism." He also speaks of the old rule being abolished by statute in several states.

The New Jersey case we speak of *supra* sustains the old rule and cites a number of cases in its support and many other cases appear against it as a rule prima facie and to the latter class of cases North Carolina belonged prior to this case, a better way of regarding the matter, we think, than to say the old rule should be entirely wiped out. It was a rule at common law and it seems all too easy for a court to get rid of a rule at common law by calling it a rule of evidence. It was a rule of substantial right, and ought not to be wiped out by ratiocination as to changed contions, when the legislature by statute has changed the conditions and remains silent as to the old rule. Courts need not be so swift as to things the legislature fails to notice.

LEGAL ETHICS—PART II—THE DUTY OF A LAWYER TO THE COURT.*

The duty of a lawyer to the court is, first, that which every person owes to the court, a violation of which leads to punishment for contempt, but further and particularly the duty which arises from the fact that he is now and for many centuries past has been regarded as an officer of the court. Originally, in England, parties were required to appear in person before the court, and after their appearance was noted they could, in civil cases be represented by a person styled *responsalis*, who could speak for them, as an advocate. Subsequently, on account of the inconvenience of attending in person, letters of authority to appear by attorney, who was an agent in fact, were issued by the king; then by royal ordinance of 20 Edward I the justices were directed to appoint attorneys in each county, to the number of 140 for all England, with authority

*Mr. Boston's prominence in the field of Legal Ethics by reason of his chairmanship of the New York County Lawyers' Association Committee on Legal Ethics will give added weight to his views in the present series of articles, the first of which appeared in 78 Cent. L. J., p. 400, entitled Legal Ethics—The Source and Formulation of Ethical Precepts.

to increase the number. It is said that because of the limitation of the number in this ordinance, the position came to be regarded as an office. By the act of 4 Henry IV, c. 18, attorneys who passed the examination of three justices were put on the roll and received and sworn well and truly to serve in their offices. It is said that this statute first changed attorneys in the English courts, from attorneys in fact, to attorneys of record in the court. From that time at least they have been regarded as officers of the courts. A statute of New York requires each of them upon admission, to take in open court the constitutional oath of office to support the Constitution of the United States and the Constitution of the State of New York and faithfully to discharge the office of attorney and counsellor of the courts of record of the State of New York according to the best of his ability.[1] It also requires them to subscribe this oath in a roll or book to be kept in the office of the clerk of the Appellate Division of the Supreme Court for that purpose. They thus become officers of the court, and at least since the taking effect of c. 253, Act 1912, subject to the power and control of the Supreme Court.

Since this law took effect, the Appellate Division in this department (First Judicial Department of New York State), in referring to it, has said: "It is our duty to condemn conduct which tends to impair or defeat the administration of justice, or degrade and impair the usefulness of the profession, and protect the state and the public from lawyers who prostitute the authority given to them for private gain, by imposing on or defrauding their clients or the tribunals which are instituted to administer the law and protect those whose rights and interests are committed to their care. If this country is to be governed by law, it is essential that those charged with its administration should be honest in the discharge of the duties confided to and obligations imposed upon them."[2]

The courts constitute the judicial branch of our government; it is their duty in a broad sense to see that justice is duly administered; the Supreme Court in the state (of New York) is now expressly charged with power and control over attorneys; and attorneys are its officers, sworn to discharge the duties of their office to the best of their ability. In a broad sense, therefore, they owe the duty to the court of which they are officers to fully perform the duties of their office to the best of their ability. In this sense the duty to the court would include the entire duty of the office, embracing as well the duty to the state and the duty to the client arising from the office; but usually these duties, for convenience of classification are separated, and the duty to the court is spoken of as a matter distinguishable from the duty to the state and the duty to the client, though it may be likewise a duty to the state to perform the duty to the court and to the client. Others will speak to you of the duty to the state and to the client, and I shall confine myself to the duty to the court in its narrower and specific sense.

The first duty to the court does not arise from the office, but from presence in court —a lawyer, as well as a layman, must abstain from conduct in the presence of the court, or its vicinity, which in a layman would be accounted contemptuous. Our law defines as criminal comtempts[3] disorderly, contemptuous or insolent behavior during a sitting, in the immediate view and presence of the court, directly tending to interrupt its proceedings, or to impair the respect due to its authority; breach of the peace, noise or other disturbance directly tending to interrupt its proceedings; wilful disobedience or resistance to its lawful mandate; contumacious and unlawful refusal to be sworn as a witness or to an-

(1) Judiciary Law § 466, Constitution Art. XIII, § 1.

(2) Matter of Flannery, 150 Ap. Div. 369, 1st Dept. 1912.

(3) Judiciary Law, (N. Y.) § 750.

swer any legal and proper interrogatory; and the publication of a false or grossly inaccurate report of its proceedings.

Our law defines as civil contempts a neglect or violation of duty or misconduct by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded or prejudiced, and which falls within a number of categories, of which some would apply to an attorney, for instance, a misbehavior in office, a wilful neglect or violation of duty therein; disobedience to a lawful mandate; non-payment of money ordered to be paid where execution cannot be issued; rescuing property in custody by virtue of a mandate; unlawfully detaining, or fraudulently and wilfully preventing or disabling from attending or testifying, a witness or party; and unlawful interference with proceedings. If a party or a witness, other acts are also designated as contempts. I assume that as these acts are a contempt of court, to abstain from them is a duty which the lawyer owes to the court, though they may injure a party.

But there are duties peculiar to the office which, by those who have speculated on these duties and divided them into categories, are regarded as duties peculiarly due to the court; the first of these, historically considered, as I have already pointed out, is the duty to abstain from deceit of the court. (This was condemned by statute law as early as A. D. 1275.)

Most entertaining as is Samuel Warren's book of lectures upon the duties of attorneys and solicitors,[4] I have, however, failed to discover that he specifically discusses their duty to the courts; perhaps because the Barrister in England subtends the largest angle in court.

Sharswood[5] points out that fidelity to the court requires outward respect in words and actions. He says the oath looks to nothing like allegiance to the person of the judge, unless in those cases where his person is so inseparable from his office that an insult to one is an indignity to the other. He justifies firm and decided opposition to the views expressed or the course pursued by the court, when duty to the client demands it, even to the extent of open and manly remonstrance, but with outward respect preserved. In short it would seem that this duty to the court is met when counsel exhibits good manners. He counts it among duties to the court, that counsel shall present everything in the cause openly, and not in any attempt to exert privately an influence upon the judge, or to seek private interviews, or to take occasional opportunities of accidental or social meetings to make *ex parte* statements or endeavor to impress their views; such conduct he characterizes as wrong in itself and having a tendency to impair confidence in the administration of justice, which ought not only to be pure but unsuspected. He enjoins upon counsel to discourage and prohibit their clients from pursuing a similar course; and says they should set their faces against all undue influences of the sort; and says they are unfaithful to the court if they allow any improper means of the kind to be resorted to. He says, likewise, that the counsel should avoid all unnecessary communication with the jurors before or during any trial in which he is concerned; and he should enforce the same duty upon his client.

Sharswood regards it as the duty of counsel to support and maintain the court in its proper province when it comes in conflict with the jury, and therefore not to seek a verdict from the jury, when the court, whether right or wrong, has so declared the law, that the jury ought not to give a verdict to his client; because it cannot ultimately prevail and will only cause additional delay, expense and trouble to the parties and to the public by the setting of the verdict aside and the granting of a

(4) The Moral, Social and Professional Duties of Attorneys and Solicitors, by Samuel Warren, author of Ten Thousand a Year.

(5) An Essay on Professional Ethics, 5th ed., vol. XXXII, Am. Bar Assn. Reports, 1907.

new trial. Sharswood, among the duties to the court, includes caution to use no deceit, imposition or evasion, to make no statements of facts which the counsel does not know or believe to be true, to distinguish carefully what lies within his own knowledge from what he has merely derived from his instructions and to present no "paper books" (briefs) intentionally garbled.

The canons of professional ethics of the American Bar Association, adopted at its thirty-first meeting, at Seattle, Washington, August, 1908, do not specifically enumerate the duties of a lawyer to the courts; but in several of the different canons, one can find statements of such duties. The preamble, for instance, asserts that in America, where the stability of the courts rests upon the approval of the people, it is essential that the system for establishing and dispensing justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration. And justice cannot be maintained pure and unsullied unless the conduct and motives of lawyers meet the approval of all just men. It is to be inferred from this that one duty of lawyers to the courts, is to so conduct themselves as not to shake the confidence of the public in the integrity and impartiality of their administration of the law. Among the canons, one can pick out those which enjoin conduct peculiarly relating to the lawyer's duty to the court and its judges, as distinguished from any duty to the client, or to the state; and among these are: a respectful attitude to the court, an avoidance of all attempts to exert personal influence upon the court, abstinence from communicating or arguing privately with a judge upon the merits of a pending cause, refraining from giving a frivolous excuse when assigned as counsel for an indigent prisoner. These canons provide that contingent fees where sanctioned by law should be under the supervision of the court; and though our courts, in view of state legislation[6] rarely interfere with a fee fixed by agreement between client and attorney, they do not refrain from criticising it, if it appears to them unconscionable and in one case of disbarment (A. D. 1881) one of the causes was a depraved professional morality indicated by making an unconscionable agreement with the client for excessive compensation and not advising his client of its excessive nature.[7]

This is a power so rarely exercised that many lawyers have certainly lost sight of its existence. While it might be considered that this duty not to overcharge is a duty owing to the client, the underlying reason for the punishment inflicted in the case cited is, I think, the fundamental one that the stability of the courts is dependent upon the public confidence in the integrity of their administration, which could not long survive their toleration of misconduct on the part of their officers in dealing with litigants to their own advantage. In these canons to which I have referred it is considered improper for a lawyer to assert in argument his personal belief in his client's innocence, or in the justice of his cause. It is pointed out, that no fear of judicial disfavor should, however, restrain him from the full discharge of his duty to his client. He is enjoined to use his best efforts to restrain and prevent his client from doing those things which he ought not to do, particularly with reference to conduct toward courts, judicial officers, jurors, witnesses and suitors. In respect to testifying for his client, except in merely formal matters, it is suggested that if he is to be a witness, he should leave the trial to other counsel, and except when essential to the ends of justice, he should avoid testifying in behalf of his client. The underlying principle here, doubtless is, that trial counsel, is an adviser and critic, that he aids the court to reach a correct conclusion by argument up-

(6) Judicial Law, (N. Y.) §§ 474, 475.

(7) In Matter of ——, an Attorney, 86 N. Y. 563; s. c. Sub. nom. in re Powers, 13 N. Y. Weekly Dig. 476.

on the evidence of others, and that he should not furnish both the testimony and the critical argument. The canons condemn newspaper publications by a lawyer as to pending or anticipated litigation as tending to interefere with a fair trial and otherwise prejudice the due administration of justice. There is probably no single principle of ethics, as applied to the practice of law, which is more frequently broken by New York practitioners than this. These canons point out the duty of the lawyer to the court, in punctuality of attendance and in conciseness and directness in the trial and disposition of causes. The duty of punctuality is one which the courts themselves in this city usually enforce with strictness, though themselves frequently most lax in this particular, perhaps because of press of judicial duties. Lack of candor and fairness is also condemned in the canons, and in particular the misquotation of a paper, or of testimony, of argument or language of opposing counsel, decision or text book, or the citation of an overruled authority of a repealed statute; or the assertion of a fact not proved, or the concealing or withholding of a position in an opening argument, upon which counsel intends to rely. They condemn the offering of evidence, which the lawyer knows the court should reject, in order to get it before the jury, and addressing to the judge arguments upon a point not properly determinable by him. In all of these matters, as it is pointed out, the lawyer is charged with the duty of aiding in the administration of justice. Attempts to curry favor with the jury are condemned, as is private conversation with jurymen, or communications with them even in matters foreign to the cause. Counsel should not ignore known customs or practice of the bar, or of particular courts, even when the law permits, without timely notice to his opponent. The canons condemn stirring up litigation either directly or through agents, and particularly the practice commonly known as ambulance chasing. To uphold the honor of the profession lawyers are urged to accept without hesitation employment against a member of the bar who has wronged his client. They are likewise urged to guard against the admission of unfit men to the bar. They are cautioned to decline a civil cause and to decline to make a defense when convinced that it is intended merely to harrass or injure or to work oppression or wrong. It is said that a counsel's appearance in court should be deemed an assertion on his honor that in his opinion his client's cause is one proper for judicial determination; and he is said to be responsible for advising questionable transactions, bringing questionable suits and urging questionable defenses, and he cannot shift the responsibility to his client. He is chid not to render any service or advice involving disloyalty to the law, disrespect to the judicial office or corruption of any person exercising public office or private trust, or deception or betrayal of the public.

It is said: "But above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen."

In the appended oath (not however required in this state) he promises to maintain the respect due to courts of justice and judicial offices; not to counsel or maintain any suit or proceeding appearing to him unjust, or any defense save such as he believes to be honestly debatable under the law of the land; and to employ for maintaining causes such means as are consistent with truth and honor, and never to mislead judge or jury by any artifice or false statement of fact or law.

It may be truly said that many of these precepts are statements of a duty to the state as well as to its courts.

The Committee on Professional Ethics of the New York County Lawyer's Association has endeavored to embody in more concise form for adoption by that associa-

tion, which, however, has not yet adopted it, a statement of the lawyers' duties in New York. The following canon relates to the courts:

"In his relation to the courts and judicial officers, he should maintain their dignity by respectful address, and by punctilious discharge of every duty; and should abstain from all attempts to curry favor and even from the appearance of utilizing personal relations to secure professional advantage. He should observe the mandates and judgments of the courts until they are properly reversed, modified or suspended, although he is under no obligation to overlook acts of judicial malfeasance out of a false respect for the office."

A rule of practice in New York State requires a lawyer to serve as guardian *ad litem* of an infant when designated by the court (General Rule No. 50); and though I am not aware of any formulated rule, it is commonly regarded as the duty of an attorney to act, when assigned by the court, as counsel for an indigent person accused of crime.

Professor Archer of Boston in his recent book (1910) on the Ethical Obligations of the Lawyer, summarizes the duty of the lawyer to the court as being based upon the fact that he is its officer, and as including the duty not to disparage the court as an instrumentality of justice; the duty of loyalty to the judge out of court as to a superior officer, and respect and courtesy in relations with him; the duty not to delay trials, punctuality in attendance and expedition in trials, not to offer improper evidence, not to argue upon matters not in evidence and not to offer garbled law in making requests for rulings.

But it seems to me that this statement is not sufficiently comprehensive.

Curiously enough the duties of a lawyer to the court have not received a complete consideration from the *courts themselves;* but this is because the courts are never called upon to state the whole duty of a lawyer; they necessarily determine only the propriety of particular conduct which they are required to consider. The most common complaints have been crystallized in the statutes defining the offenses punishable as criminal or civil contempts, to which I have already referred. Until recently other complaints against lawyers were comparatively rare; the courts rarely took the initiative; and grievance committees of bar associations were practically inactive; while single attorneys and their clients were discouraged from proceeding against offenders by the resentful or highly critical attitude of the courts themselves toward complaints so presented; they were required to be presented in a particular way, and attorneys presenting them unsuccessfully were, in some cases, rebuked and charged with costs and expenses of the proceeding, while the client fared little better.

And the cases of discipline of which the courts themselves and *of their own motion* took cognizance against an attorney were only those in which an attorney made some accusation against a judge of the court. These cases therefore are given an extraordinary prominence, and if we were to rely upon them alone we would get the erroneous impression that the only duty which the attorney owes to the court is to abstain from criticisms of its judges. As we have learned, however, from what has already been said, this is not an exhaustion of the duty which the attorney owes to the court. There are several illustrations, however, of this duty, which I shall mention. One disbarment was based upon filing an affidavit charging a Surrogate with corrupt practices; and denouncing him in his court with being an infamous, foresworn and corrupt judge, and reiterating and insisting upon the truth of the charges in the proceeding for disbarment (Matter of Murray, 11 N. Y. Supp. 336). The truth of the charges, if true, does not seem to have been regarded as any extenuation or mitigation of the offense of the lawyer in making them. The court quoted the view of the Supreme Court of the United States

(Bradley v. Fisher, 13 Wall. 355) that it is the duty of attorneys "to maintain at all times the respect due to courts of justice and judicial officers. This obligation is not discharged by merely observing the rules of courteous demeanor in open court, but it includes abstaining out of court from all insulting language and offensive conduct toward the judges personally for their judicial acts." While this seems to be the law, as administered by the courts, I personally deplore it, as tending to terrorize the bar, into submission to judicial corruption and tyranny. We do not find it necessary to protect our executive or legislative branches with such a severe penalty against their critics; and to my mind, it is unnecessary to the protection or permanency of our judicial institutions. It is true that the Appellate Division has mitigated the evil of this attitude to some extent by intimating that a lawyer has a duty to attack a corrupt judge in a tribunal which may remove the judge; while it is professionally a capital offense to accuse him to his face in his own court, or in any effort to review his decision. Where a lawyer submitted, upon a motion to dismiss an appeal, an affidavit reflecting upon the character of the justice who rendered the judgment appealed from, he was suspended for six months.[8] An attorney was censured for writing to a judge complaining of his decision, and reflecting upon the integrity of the justices of the court.[9] The City Court of New York considered it to be its duty to certify to the Supreme Court for its action, the act of an attorney in addressing and mailing to a judge a letter severely criticising a decision, and threatening to lay the matter before the bar association.[10] The same court accepted an apology from an attorney who made a similar accusation and threatened to lay the judge's conduct before the Appellate Court and the public.[11]

(8) Matter of Rockmore, 127 Ap. Div. 499.
(9) Matter of Manheim, 113 Ap. Div., 136, 1st Dept. 1906.
(10) In re Wilkes, 3 N. Y. Supp, 753.
(11) In re Griffin, 1 N. Y. Supp. 7.

The following cases of discipline of attorneys in New York may illustrate the duty of the attorney to the court, though the misconduct was not specifically stated to be a violation of any duty to the court; it is obviously a violation of some duty, but according to different views some of it may be a duty to the state, some a duty to the client.

Lawyers have been disbarred for the following conduct: for forging a decree; for being a common mover and maintainer of suits upon frivolous pretexts; for deceiving the court by altering a verification; for making an unconscionable agreement with a client as already stated above; for collusive manufacture of evidence; for stating a false account against a client and testifying falsely to sustain it; for abusing a process of the court; for inducing witnesses to testify falsely; for procuring the institution of a suit upon a complaint known to the lawyer to be false; for giving a client money to enable him to get beyond the process of a court; for testifying falsely in favor of a client; for verifying a false account and filing it; for procuring satisfaction of judgment by false and fraudulent statements; for paying money to a canvasser to procure litigated business and agreeing to pay the expenses of the litigation; for suppressing material discreditable facts in procuring admission to the bar; for practicing under the name of a firm of which one member was dead, and the other suspended from practice; for paying money to the clerk of the court to procure the irregular discharge of bail; for filing sham answers and sham affidavits in his own behalf; for permitting the guardian of an infant to settle a suit without an order of court, when an order should have been obtained; for subornation of perjury; for endeavoring to obtain a verdict upon testimony known to be false (here it was said to have been his duty to disclose the fact to the court upon its discovery, and to withdraw from the case); for the unauthorized use of the name of another attorney in set-

tling a case for his client; for swearing falsely; for making an agreement to pay an expert witness a share of the recovery; and permitting him to testify falsely that he had no interest in the recovery, without calling the court's attention to the fact; for permitting a witness to testify, as to an opinion, founded upon facts which the lawyer knew to be false, the truth having been purposely concealed by him from the witness, in order to elicit the opinion which he desired to secure; for aiding and abetting a witness in perjury; and proceeding with an action against the wishes of his client, after the repudiation of his authority by the client, from whom the apparent authority had been procured when she was incapable of realizing what she was doing; for participating in and authorizing payments by a street railway for influencing witnesses and the administration of justice; for allowing a disbarred attorney to practice in his name; for falsely certifying as a commissioner of deeds, the acknowledgment of instruments before him.

Suspensions have been directed for the following causes: For failure to pay costs directed to be paid for starting and prosecuting an action without being retained; for writing out answers to be given by a witness examined on commission and being present and reading some of them to the commissioner; for altering an undertaking and using it in another court, without re-acknowledgment or re-execution; for violating an agreement of settlement, and wilfully altering a court record, and deceiving the court, and agreeing upon and submitting a fictitious case to the court; for making a false affidavit upon a taxation of costs and subsequently supporting it by affidavits known to be false, or else recklessly made; for verifying and filing objections to a will against the instructions of a client; for submitting on appeal an affidavit reflecting upon the justice who rendered the judgment appealed from; for submitting an affidavit to procure an extension of time to serve a complaint, when the client has ordered the discontinuance of the action stating that she had no cause of action; for an agreement to divide fees in a negligence action with a layman; for repeated efforts to secure the court to accept answers which he knew to be false, and finally interposing them and thus delaying a just recovery; for practicing law under a firm name, containing the names of two persons with whom he had no connection; for obstructing service of a subpoena, and asserting a false claim of professional privilege as counsel for a corporation of which he was also director, whose knowledge was not privileged; for permitting a corporation to send threatening notices over his name, falsely pretending to be sent pursuant to a law of the state, and giving to the corporation authority for its employees to sign his name to business letters; for agreeing to pay to an expert witness a percentage of the lawyer's fee for securing the reduction of a tax assessment.

Lawyers have been censured for the following causes: Early in the history of the state, for withholding money from a client under an agreement for a contingent fee (the law now allows this, as the result of legislation authorizing it); a lawyer was reprimanded for appearing for an infant defendant in order to effect a settlement already agreed upon, without disclosing to the court his relations to the plaintiff, who had procured him to appear to effect the settlement; other censures have been visited as follows: for writing a letter to a judge complaining of his decision, and reflecting upon the integrity of the justices of the court; for authorizing a collection agency to send in his name improper duns, falsely stating that action had been begun; for inducing a complainant to withdraw a charge of petty larceny by promising restitution, without informing the magistrate of the circumstances; for culpable carelessness in making a false affadavit of payment of a disbursement; for gross neglect and carelessness in not pressing a case to trial; for interposing an answer denying an in-

debtedness, when he admitted in conversation that there was no defense, and procuring adjournments under promise to obtain payments on account, and then disbursing his client's money in meeting other obligations; for interposing two sets of contradictory affidavits as to the same matters in two different cases; for certifying as a notary public the acknowledgement before him of deeds which were not in fact so acknowledged; for taking vexatious appeals and making vexatious motions for delay to stay execution for murder; for agreeing, in a contract of retainer in a condemnation proceeding, to pay all expenses of every kind, including expert witness fees, surveyor's fees, engineer's fees, etc.; and for agreeing to pay all court fees, fees of witnesses and necessary disbursements to judgment.

Although the existence of these various reprehensible practices for which lawyers have, in this state, been disbarred, suspended from practice or censured, shows that they have all been indulged in by the offending practitioners, it is to the credit of our courts and the administration of justice that they have been condemned when brought to light, for a system of justice in which many or most of them could prevail as recognized practices would not be long in losing the public confidence which we have seen is absolutely essential to the stability of the courts of which the offending attorneys are officers.

CHARLES A. BOSTON.

New York, N. Y.

DAMAGES—PUNITIVE DAMAGES.

BETHEA v. WESTERN UNION TELEGRAPH CO.

Supreme Court of South Carolina. May 6, 1914.

81 S. E. 675.

A verdict which finds for plaintiff for punitive damages only contains an implied finding of nominal actual damages, and is sufficient; there being evidence to sustain a finding for at least nominal damages.

GARY, C. J. On the 19th of May, 1912, G. F. Bethea a brother of Lawrence Bethea, delivered to the defendant the following telegram addressed to the plaintiff at Dillon, S. C.: "Come at once if you want to see brother living."

The jury rendered the following verdict: "We find for the plaintiff two hundred and fifty dollars punitive damages."

The defendant appealed upon the following exception: "The court erred in refusing to set aside the verdict and order a new trial, when, from the finding taken in connection with the charge of the judge, it appeared that there had been no actual damages inflicted, and hence punishment was visited on the defendant for a wrong which had not been committed, and which the jury by its findings negatived."

His honor, the presiding judge, charged the jury as follows in regard to the form of their verdict:

"The form of your verdict will be either, 'We find for the plaintiff' so many dollars actual damages, and that includes, of course, mental anguish, intense mental suffering, and so many dollars punitive damages, if you also find punitive damages, or, 'we find for the defendant.' In other words, gentlemen, if you find both actual and punitive damages, I want you to keep them separated. Now if, in your deliberations, you have any confusion about the form of the verdict, or the law, or anything else, don't hesitate to let it be known. If I can be of any service to you, I will be glad to do so. Is there anything further for the plaintiff?

"Mr. Owens: It occurs to me, possibly, that the complaint stands as one solid demand; that there would be no use in the jury specifying as to damages; that the jury could find for the plaintiff without specifying what they find as actual damages, and what they find as punitive damages.

"The Court: They might do it; but I am not going to permit them to do it. If you find that, as the result of the negligence and wanton conduct of the defendant, he has suffered mental anguish, you have a right to award actual damages and also punitive damages, and I want you to keep them separate. You could find a bulk sum; but I don't want them kept that way. If you find for the defendant, you will simply say, 'We find for the defendant.'"

In the case of Doster v. Telegraph Co., 77 S. C. 56, 57 S. E. 671, the court had under consideration of the question whether a verdict for punitive damages only could be sustained. Mr. Justice Woods, who delivered the opinion of the court, thought that the verdict should be set aside; but the other members of the court thought otherwise, and in stating their

views he used the following language: "In their view the verdict is responsive to the cause of action based upon allegations of injury as the result of willful breach of duty, in which teh jury had power to award damages, and characterize them punitive. They think, further, the verdict does not negative the idea that there was some actual injury, however slight, but negatives the idea that the injury was done negligently and inadvertently, and declares that it was done willfully, hence the character of the damages awarded could be punitive, instead of strictly compensatory, and that the jury may also have thought that the actual injury was not so substantial as to require expression in their verdict. The majority further think, inasmuch as it has been held that there was evidence sufficient to require that the matter of punitive damages should be submitted to the jury, the verdict upon such issue involves a finding of whatever is legally essential as a basis for punitive damages."

(1, 2) Under this authority, we do not regard the charge of his honor, the presiding judge, and the verdict of the jury as inconsistent. A verdict which shows upon its face that it is a finding for punitive damages only is, in effect, dual in its nature. It is not only a finding for punitive damages, but also for actual damages, that are merely nominal, and therefore "not so substantial as to require expression in their verdict." There is nothing in the charge to indicate that the circuit judge intended to change the rule announced in Doster v. Telegraph Co., 77 S. C. 56, 57 S. E. 671.

The plain object of the charge was that the verdict of the jury should indicate the kind of damages to which the plaintiff was entitled, if they found in his favor; and, as we have just stated, the verdict shows this fact.

There was testimony that the plaintiff sustained at least some actual damages. He expended 25 cents for the transmission of the telegram, and 15 cents for its delivery to him by a third party to whom it was handed by the defendant. He also suffered inconvenience by reason of the delay in the delivery of the telegram, as he was compelled to make the trip on a bicycle, and did not arrive at Dillon until about 8 o'clock, which was too late to see his brother before he died.

(3) If there had not been testimony tending to prove some actual damages, even though nominal, the verdict for punitive damages alone would not have been proper.

(4) There is another reason why the appeal should be dismissed. The alleged irregularity did not involve the merits, but merely pertained to the rules of procedure. In such cases the irregularity must be called to the attention of the court at the earliest opportunity; otherwise it will be deemed to have been waived. State v. Norton, 69 S. C. 454, 48 S. E. 464; Sumter v. Hogan, 80 S. E. 497. That was not done in this case. The appellant, instead of making its objection to the form of the verdict as soon as it was read, waited until the jury separated and then urged the alleged irregularity as a ground for a new trial. This was too late.

Appeal dismissed.

HYDRICK, WATTS, FRASER, and GAGE, J. J., concur.

NOTE.—*Nominal Damages as Basis for Exemplary Damages. No. 2.*—We considered this subject in 74 Cent. L. J. 105 in a note to a Missouri Supreme Court case holding that punitive damages may be recovered in a legal action though only nominal damages are recovered. But the case distinctly ruled in favor of "nominal actual damages" supporting a verdict for punitive damages, and all of its citations go on the theory, that these nominal damages must be something more than a sum to represent the violation merely of a legal right. See Lampert v. Judge & Dolph Drug Co. (Mo.), 141 S. W. 1095.

In our former annotation we observed in discussing the Doster case alluded to by the instant case that: "It seems true, that if some damage is presumed from a willful tort and nominal damages can be directed, if there is a finding of willful tort, it would look like failure to embrace it should not vitiate a finding for punitive damages."

Since that annotation there have been decided other cases. A late case from Texas holds that for exemplary damages to be recovered there must be a showing of actual damages, and actual damages must be given by the verdict. Bushong v. Anderson (Tex. Civ. App.), 143 S. W. 200. This militates against the idea that there need be no actual finding of actual damages as a predicate for punitive damages.

In Kentucky it seems not necessary in a case where compensatory damages could have been included but were not, that the verdict must include both or it fails as to punitive damages only. Louisville & N. R. Co. v. Ritchel, 148 Ky. 701, 147 S. W. 411. The court spoke as to this as follows: "It is also contended that under the rule announced in this state, punitive damages must bear some relation to the damages allowed by way of compensation. Such, however, is not the rule. The doctrine is that punitive damages must bear some relation to the injury and the cause thereof. As the jury, even under the instructions as given, might have awarded compensatory damages, though nominal in amount, and under a proper instruction might have awarded damages for humiliation and mortification of feeling. We conclude that the fact that the jury returned a verdict for punitive damages only, furnishes no just reason why the verdict should not be allowed to stand, since, under the rule of force in this state, punitive damages,

when allowed, are given as compensation to the plaintiff, and not solely as a punishment of the defendant."

This thought does not greatly prevail elsewhere in the law, though it really prevails in the mind of the jury and practically in the way courts treat a verdict for punitive damages. How courts may ever order remittitur on any idea of a verdict for punitive damages being merely as a punishment in the way of a warning we could never grasp, nor how they find out how great should be the remittitur.

A late case by Wisconsin Supreme Court treats interestingly the question of the infliction of punitory damages in a seduction case, where defendant had been punished criminally for the act and in addition the daughter of the plaintiff had obtained a verdict for such damages. The opinion says: "The law giving exemplary damages is an outgrowth of the English love of liberty regulated by law. It tends to elevate the jury as a responsible instrument of government, discourages private reprisals, restrains the strong, influential and unscrupulous, vindicates the right of the weak and encourages recourse, and confidence in, the courts of law by those wronged or oppressed by acts or practices not cognizable in, or not sufficiently punished by, the criminal law. The latter law must be uniform as to persons and acts, must fix a maximum and minimum punishment on this basis and cannot always be adjusted to particular circumstances of atrocity which occasionally occur." One merit in its infliction of punitive damages might be that though it be a pecuniary penalty it is not like a penalty coming out of a trust, which could be recovered out of the public. In this case the court said: "Had the learned circuit judge not cut down this verdict for exemplary damages, we would, no doubt, have reduced it considerably below the sum fixed by the circuit judge. But we have the judgment of the jury and the trial judge as to what is a proper amount for punishment, warning and deterrent, and with some hesitation we allow the damages to stand as fixed by the circuit judge." Here we see the rule in such cases is "the chancellor's foot." Luther v. Shaw, 147 N. W. 18. C.

ITEMS OF PROFESSIONAL INTEREST.

BAR ASSOCIATION MEETINGS FOR 1914—WHEN AND WHERE TO BE HELD.

American Bar Association—Washington, D. C., October 20, 21 and 22.
Alabama—Montgomery, July 10 and 11.
California—Oakland, November 19, 20 and 21.
Colorado—Colorado Springs, probably July 9 and 10.
Georgia—Tybee Island, June 18, 19 and 20.
Iowa—Burlington, June 25 and 26.
Kentucky—Mammoth Cave, July 8, 9 and 10.
Michigan—Flint, June 24 and 25.
Minnesota—St. Paul, August 20, 21 and 22.
Missouri—St. Louis, latter part of September.
New Hampshire—Probably Concord, June 27.
New Jersey—Atlantic City, June 12 and 13.
New Mexico—August 18.
North Carolina—Wrightsville Beach, June 29, 30, and July 1.
North Dakota—Grand Forks, September 15.
Ohio—Cedar Point, July 7, 8 and 9.
Pennsylvania—Erie, June 30, July 1 and 2.
Vermont—Montpelier, October 6.

MEETING OF THE NORTH CAROLINA BAR ASSOCIATION.

The Bar Association of North Carolina will meet June 29, 30 and July 1, at Wrightsville Beach. The program of the meeting is as follows:

June 29, 8:30 p. m.—The Association convenes, with the President, Mr. Thomas S. Rollins, of the Asheville Bar, presiding.
Address of Welcome—By Mr. George B. Elliott, of the Wilmington Bar.
Response—By Mr. G. L. Jones, of the Waynesville Bar.
President's Address.

June 30, 10:00 a. m.—
Address by Chief Justice Walter Clark, on "Reform in Judicial Procedure."
Address by Mr. A. L. Brooks, of the Greensboro Bar, on "The Southern Lawyer, His Traditions and Opportunities."

Evening Session, 8:30 p. m.—
Address by Hon. A. J. Montague, of Richmond, Va.

July 1, 10:00 a. m.—
Address by Hon. Rome G. Brown, of Minneapolis, Minn., on "Judicial Recall."
Reports of Special Committees.
Election of Officers.

Reports of Standing Committees will be presented at Monday evening's session, except that of the Committee on Memorials, which will be presented at Tuesday morning's session.

Application for admission to membership can be had by applying to members of the Committee on Admission to Membership.

CORRESPONDENCE

SUING MASTER AND SERVANT IN SAME ACTION AND EXEMPTING SERVANT FROM LIABILITY.

Editor Central Law Journal:

I have just read with interest, your editorial in the issue of May 29th, commenting on the decision of the New York Court of Appeals, re-

versing a judgment in favor of the plaintiff against the Buick Motor Company, because the jury found in favor of the servant of the Buick Company, whose actual negligence caused the injury.

I have recently argued in the Appellate Court a very similar question, arising under the Employers' Liability Act, of Congress, substantially the same act in Texas. The point I argued was as follows:

A and B are two brakemen, each of them is negligent, which results in an injury to A; A sues the Railroad Company and joins B as a co-defendant; B and the Railroad Company each plead and prove the contributory negligence of A. Under the general rule, there is a good defense for B, but under the Employers' Liability Act, the contributory negligence of A goes in mitigation of damages only, so the rule established by that act applying alone to railroads enabling B, the real guilty party to go free and punish the Railroad Company, which is only theoretically guilty of the negligence that injured A. If the doctrine of the Employers' Liability Statute is carried to that extent, in my mind, it will render the rule of respondeat superior an absurdity, for it is clearly unjust that the real culprit should go unpunished, and that one, who is made liable only for public policy, should suffer.

Yours very truly,
F. H. PRENDERGAST.

Marshall, Tex.

BOOK REVIEWS.

MOORE ON CARRIERS, SECOND EDITION.

This comprehensive work in three volumes is by Mr. De Witt C. Moore of Johnstown, N. Y., author of "The Law of Fraudulent Conveyances." In the treatise now at hand the law of the carrier has been treated from about every standpoint except that of transportation through the air, as to which Europe is somewhat in advance of us. But in this book we have the carrier of freight and passengers, by railroad, by steamship, by dray, cart and elevator and decision given as to their relation to the public and their customers, and interestingly is treated the subject of interstate carriage of goods.

The chapters in the book on limitation of liability are especially to be commended for their thorough treatment and discriminating use of authority. Where, however, the work is so replete in citation and discussion of authority it is difficult to give separate commendation of any part.

There is an appendix to the work containing the Act to Regulate Commerce as amended and other federal acts having relation to carriers and their compilation in this way gives value to the excellent treatise the author presents.

The table of contents and the index are well constructed and make the work readily usable by practitioners.

The volumes are very attractively gotten up in a binding of law buckram and come from the well-known house of Matthew Bender & Company, Albany, N. Y. 1914.

LANDMARKS OF A LAWYER'S LIFETIME.

Mr. Theron G. Strong, of New York, presents his reminiscences of the bar in delightful vein, which should prove interesting alike to lawyer and layman. He tells of the lives of distinguished judges and lawyers of New York and New Jersey bar and enlivens his story with anecdotes and sayings by the subjects he portrays, giving at the same time an elevated view of the practice of the law as a profession. But times, with lawyers in New York as well as in the rest of the country, are changing. The mildew of the age seems settling on the profession and making of it a business more and more, a profession less and less. We like to look back at the time when the bar seemed to have been held in higher esteem than now and to permit our aspirations at least for a return of some of the things of the old regime.

Mr. Strong's task shows all through a labor of love, and well may one be thought to wish to put in enduring form the recollections arising out of a life spent in association with such distinguished leaders of the bar as Mr. Strong enjoyed.

The volume before us is in cloth of very attractive appearance and comes for the house of Dodd, Mead & Company, New York. 1914.

HUMOR OF THE LAW.

A lawyer was arguing a case before a certain judge between whom and himself there was no love lost. The judge listened for a while with ill-concealed impatience, and then burst out with:

"Tut! tut! Mr. W——, you have your points of law all upside down!"

'I don't doubt that they seem so to your Honor," replied Mr. W., 'but you'll think differently when your Honor is reversed."

From New York Tribune.

A capital story is told of Sir John Simon, who always prepares his cross-examinations very carefully beforehand. Soon after he was called to the bar he had to defend a man whose only chance of getting off depended on there being insufficient evidence of identification. "Now," remarked Sir John, rising to cross examine the principal witness for the prosecution, "you say you are sure this is the man?"

"Yes," said the witness.

"Ah," commented counsel, "now I want to know if you can see anybody in this court who was in your shop last night talking to you?"

The witness, rather surprised, looked all round the court, and at length admitted that he could not recognize anybody.

"Good," said Sir John. "Now have you ever seen me before?"

"Never," said the witness positively.

"Then it may surprise you to learn," Sir John rapped out, "that I entered your shop last night and asked you for a packet of pins." The witness collapsed and Sir John won his case.—The Law Student's Helper.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Banks and Banking**—Forgery.—Under Negotiable Instruments Law, bank which collected checks upon which payee's indorsement was forged held liable to make good the amount it had received.—Standard Steam Specialty Co. v. Corn Exchange Bank, 146 N. Y. Supp. 181.

2.——Interest.—A depositor is entitled to interest on a certificate of deposit after the bank's refusal of payment.—Bowman Bank & Trust Co. v. First Nat. Bank, N. M., 139 Pac. 148.

3. **Bills and Notes**—Accommodation Indorser.—Where plaintiff obtained defendant's accommodation indorsement on a note by false representations as to the maker's solvency, and as to the plaintiff's intention to loan the money on the note himself, instead of obtaining it for the maker, such fraud constituted a defense.—Dexter v. Fuller, Mass., 104 N. E. 455.

4.——Forgery.—Where draft was paid on forged indorsement in England, where such payment in good faith is deemed a payment in due course, drawer in Missouri held not liable to payee for the amount received for the draft, though under the law of the state, such payment would not have discharged the drawee.—Belestin v. First Nat. Bank, Mo., 164 S. W. 160.

5.——Notice.—The bank receiving a check of a corporation indorsed by an officer or agent thereof in blank or to his own order is thereby put upon inquiry.—Standard Steam Specialty Co. v. Corn Exchange Bank, 146 N. Y. Supp. 181.

6.——Notice.—The holder of a note, who accepted it with knowledge that if defendant should be indebted to the payee in a less amount than that named in the note, he was to be liable only for the reduced amount, could recover only the actual debt.—Sellitto v. Lamberti Const. Co. 146 N. Y. Supp. 178.

7.——Notice.—A purchaser of a check after maturity, which shows on its face that payment had been refused, takes it subject to the equities between the parties, and, if the debt evidenced by the check has been partially discharged, he acquires nothing more than the balance due.—Rahe v. Yett, Tex., 164 S. W. 30.

8. **Cancellation of Instruments**—Estoppel.—A surviving partner, who instead of himself administering the partnership estate, induced decedent's widow to procure an order refusing administration, and afterwards contracted with her to purchase decedent's interest in the partnership, held precluded in equity from having the contract set aside for mutual mistake and fraud by reason of his own inequitable conduct in seeking to evade the law.—Barnum v. Barnum, Mo., 164 S. W. 129.

9. **Carriers of Goods**—Limitation of Liability.—That a shipper assents to the terms of a bill of lading limiting the carrier's liability without reading it cannot deprive the carrier of its protection.—Johnson v. New York, N. H. & H. R. Co., Mass., 104 N. E. 445.

10.——Limitation of Liability.—Plaintiff, an experienced jewelry salesman, being compelled to ship jewelry cases by freight, held charged with actual notice of a stipulation on the back of the bill of lading exempting the carrier from liability except by special agreement containing the stipulated value of the articles indorsed thereon.—Russell v. Quincy, O. & K. C. R. Co., Mo., 164 S. W. 164.

11.——Notice of Loss.—A general provision in a bill of lading covering an interstate shipment that claims for damage must be made in writing to the carrier, within four months after delivery, or after reasonable time has elapsed for delivery, in order to make the carrier liable, is valid, though not supported by any special consideration.—Johnson Grain Co. v. Chicago, B. & O. R. Co., Mo., 164 S. W. 182.

12. **Carriers of Passengers**—Employees.—Under the provision of the Hepburn Act, which permits a railroad company to issue free transportation to employes and their families, where the wife of an employe was injured while traveling on a free pass, she could recover, though the injury did not result from wantonness or wilful negligence.—Charleston & W. C. Ry. Co. v. Thompson, Ga., 80 S. E. 1097.

13.——Extraordinary Care.—Since a railroad, by furnishing racks in cars for the stowage of baggage, invites passengers to use them to the limit of safety, the railroad must so operate its train as not to endanger passengers sitting underneath them; and, if there is a risk not apparent in putting one suit case upon top of another, the railroad should give notice of the danger.—Rosenthal v. New York, N. H. & H. R. Co., Conn., 89 Atl. 888.

14.——Res Ipsa Loquitur.—That plaintiff, a street railway passenger, was hurt in a collision with a wagon, was prima facie evidence of negligence of the carrier.—Housel v. Pacific Electric Ry. Co., Cal., 139 Pac. 73.

15.——Res Ipsa Loquitur.—In a passenger's action for injuries, where the cause was wholly conjectural and it was not shown that the

missile coming through the window and causing the injury was in the carrier's exclusive control, held, that there was no ground for applying the doctrine of res ipsa loquitur.—Deagle v. New York, N. H. & H. R. Co., Mass., 104 N. E. 493.

16. **Champerty and Maintenance**—Attorneys.—A contract by attorneys for service in procuring witnesses and acting as an expert in cases wherein they were acting as counsel is not champertous.—Millen v. Coakley, Mass., 104 N. E. 468.

17. **Contracts**—Duress.—If plaintiff, believing that certain plays were being infringed by defendants, threatened to restrain defendants' production of their play unless they paid him a royalty, defendants contract to pay plaintiff a royalty if he did not sue them was not invalid for duress.—Hart v. Walsh, 146 N. Y. Supp. 235.

18.——Separability.—If a contract, which contains an element which is legal and one which is against public policy, is entire, the legal consideration cannot be separated from that which is illegal so as to make the legal part enforceable, irrespective of the equities between the parties to the contract.—Cahill v. Gilman, 146 N. Y. Supp. 224.

19. **Corporations**—De Facto.—As against all persons except the state, a de facto corporation has the same powers, and is subject to the same obligations, as a corporation de jure.—Roaring Springs Townsite Co. v. Paducah Telephone Co., Tex., 164 S. W. 50.

20.——Liability of Stockholders.—Statutes imposing quasi contractual liabilities upon stockholders with respect to creditors of a corporation create an infirmity which runs with the stock.—Long v. Symonds, Mass., 104 N. E. 476.

21. **Criminal Evidence**—Confessions.—Where confessions of accused are offered in evidence, the whole of the confessions must be considered, but the jury are not required to believe such portions as seem to them unreasonable.—McLemore v. State, Ark., 164 S. W. 119.

22.——Inferences.—Though the solicitor may examine such witnesses as he deems necessary, the jury may draw an inference favorable to accused from his failure to examine a material witness bound over for the state, and presumably available.—State v. Harris, N. C., 80 S. E. 1067.

23.——Autrefois Acquit.—On the trial of the issue of a plea of autrefois acquit, it may be shown that the offenses charged in the two indictments, though similar, are not the same.—State v. Friedley, W. Va., 80 S. E. 1112.

24.——Instructions.—A charge, in a prosecution for homicide, outlining in detail the claims of the prosecution and the evidence and arguing in favor of the credibility of the people's witnesses, but containing no statement of the arguments or evidence of accused to rebut the same, was erroneous.—People v. Becker, N. Y., 104 N. E. 396.

25. **Death**—Comparative Negligence.—Under the federal Employers' Liability Act the negligence of plaintiff's intestate, if any, was not a defense, but was only material in reduction of damages.—Kenney v. Seaboard Air Line Ry. Co., N. C., 80 S. E. 1078.

26.——Conjecture.—In an action for the death of one run down by a street car, the plaintiff need not prove any positive act of care of the decedent, if under evidence due care can be inferred, but no recovery can be had if the evidence leaves the question one of conjecture.—Plympton v. Boston Elevated Ry. Co., Mass., 104 N. E. 444.

27.——Eyewitnesses.—Where no one saw killing, and there was no evidence to the contrary, held that it would be presumed that person killed exercised due care for his own safety.—Stockton v. Metropolitan St. Ry. Co., Mo., 164 S. W. 176.

28.——Federal Employers' Liability Act.—Under the federal Employers' Liability Act, giving a right of action for death to the personal representative, such representative alone can sue, and an action cannot be maintained by the widow of the decedent as such.—Vaughan v. St. Louis & S. F. R. Co., Mo., 164 S. W. 144.

29. **Divorce** — Remarriage.—Under Divorce Act, prohibiting the remarriage within a certain time of parties divorced for certain causes, and making such remarriage punishable by imprisonment, but not expressly giving the circuit court, on granting a divorce, power to include in the decree a clause prohibiting remarriage, its order against remarriage was beyond its jurisdiction.—People v. Prouty, Ill., 104 N. E. 387.

30. **Eminent Domain**—De Facto Corporation.—A de facto corporation may exercise the power of eminent domain.—Roaring Springs Townsite Co. v. Paducah Telephone Co., Tex., 164 S. W. 50.

31.——Public Use.—Where, from the nature of the business in which a railroad is to be engaged, it appears that no obligation will be assumed to the public or liability incurred other than that pertaining to strictly private business, the use is not a public one, and condemnation of private property therefor, is unauthorized.—Gauley & S. R. Co. v. Vencil, W. Va., 80 S. E. 1103.

32. **Equity**—Criminal Causes.—A court of equity has no jurisdiction in matters not involving property or civil rights, and has no jurisdiction over matters merely criminal, where no property rights are involved.—People v. Prouty, Ill., 104 N. E. 387.

33. **Estoppel**—Agency.—The doctrine that, where one of two persons must suffer by the act of a third person, he who has held that person out as worthy of trust, and having authority in that matter, shall be bound by it is applicable to all cases of agency, whether general or special.—J. L. Mott Iron Works v. Metropolitan Bank, Wash., 139 Pac. 36.

34. **Evidence**—Expert Testimony.—Where the mental capacity of the textatrix was questioned, a medical expert cannot testify as to his opinion as to her competency, based upon part of the testimony which he read and part which he heard during the trial.—Marris v. Hipsley, Md., 89 Atl. 852.

35.——Files.—The file mark placed by the clerk of the court upon a document filed with him is but the evidence of the delivery for filing, and in its absence oral testimony is admis-

sible to show that the paper was duly filed.—Gove. v. Armstrong, Vt., 89 Atl. 868.

36. **Explosives** — Proximate Cause. — Where town"s employes left dynamite in an insecure box in a street, from which it was taken by boys, who threw sticks thereof on a fire, town's negligence held not the proximate cause of the injury, on an explosion of one of the sticks.—Horan v. Town of Watertown, Mass., 104 N. E. 464.

37. **Frauds, Statute of** — Consideration. — Where an agent of an express company told a shipper, who had lost a shipment of material made to comply with a contract, to go ahead and make them again and charge them to the company, the agent could not be held personally liable. even if he had guaranteed paymnet, as the promise was without consideration, and not in writing.—Mathews v. Martin, Mo., 164 S. W. 154.

38. **Hospitals**—Damages.—The owner or proprietor of a private hospital or sanitarium, which is not a charitable institution, but is operated for profit, is liable in damages for the negligence of his employes, resulting in injury to a patient.—Richardson v. Dumas, Miss., 64 So. 459.

39.——Negligence.—Hospitals, organized to minister to all persons of all creeds, are liable for the negligence of their physicians and servants only when ordinary care has not been exercised in their selection and retention; and it is immaterial whether the patients injured were charity patients or paid the usual compensation for such services.—St. Paul's Sanitarium v. Williamson, Tex., 164 S. W. 36.

40. **Indictment and Information**—Previous Crime.—In an indictment under a statute which denounces a crime baseed upon the commission of a previous and different crime, the same technical particularity in describing the previous crime is not required as would have been in an indictment charging such original crime. —Newton v. Commonwealth, KKy., 164 S. W. 108.

41. **Injunction**—Party Wall. — Where one landowner wrongfully places the stones for the underpinning of a wall, on the land of his neighbor, the injured landowner is entitled to assessment of damages in addition to injunctive relief.—Brooks v. Rosenbaum, Mass., 104 N. E. 469.

42. **Insurance**—Deductions.—Where a policy bound the insurer to pay a specified sum "less any indebtedness of the insured or beneficiary to the company," the insurer was entitled to deduct from the proceeds of the policy any indebtedness of the insured, however incurred.—Citizen's Nat. Life Ins. Co. v. Rutherford, Ky., 164 S. W. 107.

43.——Insurable Interest.—An assignment of a life policy to one having no insurable interest in the life assured is void as within the rule against wagering policies.—Tripp v. Jordan, Mo., 164 S. W. 158.

44.——Mortgagee.—Where mortgagee did not know of the failure of the mortgagor and owner to have a valid appraisement and award made of the amount of loss as required by a fire policy, held, that such neglect would not prevent mortgagee from maintaining an action on the policy, which provided that loss should be payable to him as his interest appeared and that the insurance should not be invalidated as to his interest by any neglect of the mortgagor and required "the insured" to make proofs of loss.—Riddell v. Rochester German Ins. Co. of New York, R. I., 89 Atl. 833.

45. **Intoxicating Liquors**—License.—A license to retail intoxicating liquor, not being a property right nor a contract, but a mere permit, may be revoked by the Legislature at will.—Ex parte Everman, N. M., 139 Pac. 156.

46.——Prohibition.—To convict of unlawfully engaging in the business of selling intoxicants in prohibition territory, it must appear that accused was engaged in the selling as a business proposition.—Dawson v. State, Tex., 164 S. W. 5.

47. **Judicial Sales**—Fraud.—Unless the fund is under the control of the court, it will not relieve a purchaser at a judicial sale of his purchase, except on the ground of fraud.—Koegel v. Koegel, N. J., 89 Atl. 861.

48. **Judgment**—Collateral Attack.—An adjudication of a court having jurisdiction that it was necessary for the receivers of an insolvent banking company to enforce the liability of stockholders held not subject to collateral attack in the receivers' action against a stockholder.—Mister v. Thomas, Md., 89 Atl. 844.

49. **Libel and Slander**—Liability.—A person cannot escape liability for a libelous publication by using a question mark after the actionable language.—Spencer v. Minnick, Okla., 139 Pac. 130.

50.——Privilege.—While a fair report of a judicial proceeding is privileged, the privilege does not extend to publication of charges contained in a filed pleading or paper, which has never been called to the court's attention or made the basis of a judicial action.—Lundin v. Post Pub. Co., Mass., 104 N. E. 480.

51. **Limitation of Actions**—Nuisance.—A continuing nuisance arising from the operation of a railroad in an improper manner is not barred until the statutory period has run from the last repetition.—Willson v. New York Cent. & H. R. R. Co., 146 N. Y. Supp. 208.

52.——Starting Point.—The several periods of limitation are graduated principally with reference to the nature and quality of the evidence by which the contract must be established—Homire v. Stratton & Terstegge Co., Ky., 164 S. W. 67.

53. **Malicious Prosecution**—Termination of Prosecution.—If a proceeding against defendant before a magistrate terminates in his favor, he may maintain an action for malicious prosecution, and the termination of a criminal proceeding in defendant's favor, though reversed by a higher tribunal, is held ground for an action for malicious prosecution.—Linitzky v. Gorman, 146 N. Y. Supp. 313.

54 **Marshaling Assets and Securities**—Two Funds.—A mortgagee holding a prior mortgage on two tracts must first seek satisfaction from the part of the property which is not available to a subsequent mortgagee, holding a mortgage on but one of the tracts.—Rogis v. Barnatowich, R. I., 89 Atl. 838.

55. **Master and Servant**—Assumption of Risk.—Where a servant was injured by the caving of a sewer ditch due to defendant's negligence in failing to adequately brace the walls, the risk was not one which plaintiff assumed.—Gerardi v. Driscoll, Conn., 89 Atl. 892.

56.——Discharge.—Failure of an employe to give a surety bond in compliance with his contract justifies his discharge.—Leopold v. Hotel Shelburne, 146 N. Y. Supp. 289.

57.——Mitigation of Damages.—Where plaintiff was employed as a trimmer in millinery, she was not, on discharge, obliged to engage in a business that was not of the same general character in order to mitigate damages.—Hussey v. Holloway, Mass., 104 N. E. 471.

58.——Quitting Employment.—In the absence of a contract to work for a definite time, an employe has a right to quit whenever he choses, with or without reason.—Roddy v. United Mine Workers of America, Okla., 139 Pac. 126.

59.——Safe Appliances.—An oil and development company was not excused by the mere fact that its derrick had been constructed in the usual manner, and presumably was once in a safe condition, but was bound to use due care to maintain that condition and to guard against the wear and tear of use, or of time alone.—Ingalls v. Monte Cristo Oil & Development Co., Cal., 139 Pac. 97.

60. **Mortgages**—Priority.—Where a second mortgagee, who lent money for construction purposes, allowed the owner to represent him in hiring laborers for the construction of buildings on the land, the liens of such laborers are superior to the title of a purchaser at foreclosure of the second mortgage, but not to that of a purchaser on foreclosure of the first.—McCrory v. Adams, Mass., 104 N. E. 439.

61. **Municipal Corporations**—Negligence.—In an action for death of a boy, struck by an automobile while skipping across a park boulevard, decedent held not negligent as a matter of law.—Clark v. Blair, Mass., 104 N. E. 435.

62.——Rights of Pedestrian.—A pedestrian and a team have equal rights on a street, and each is bound to exercise his rights in such a manner as not to negligently injure the other.—Crimmins v. Armstrong Transfer Express Co., Mass., 104 N. E. 457.

63.——Rights of Pedestrian.—A pedestrian is not compelled to look at every spot he steps upon or to "feel his way," unless the danger is so great and so apparent as to lead an ordinarily prudent person to think that such care was required by, or was commensurate with, the danger.—Kelly v. Welsh, Mo., 164 S. W. 135.

64. **Negligence**—Proximate Cause.—Whether original negligence of defendant is proximate cause of plaintiff's injury, where independent act of third persons intervenes, held to depend upon whether defendant ought to have seen that the intervening act was likely to happen.—Horan v. Town of Watertown, Mass., 104 N. E. 464.

65. **Nuisance**—Test of.—For a lawful business to constitute a nuisance subject to being enjoined by surrounding property owners, it must either injure the property or sensibly interfere with its enjoyment.—Crawford v. Central Steam Laundry, Wash., 139 Pac. 56.

66. **Partnership**—Illegality of Contract.—Partnership agreements which provide for the conduct of the business after the death of a partner and for the disposition of his interest, fairly made, without any illegal purpose, and without intent to violate the statute of wills, are valid.—Murphy v. Murphy, Mass., 104 N. E 466.

67 **Principal and Agent**—Liability of Agent.—An alleged agent, who signed a note personally, the name of his principal not appearing, was liable thereon, though the payee knew that he was merely an agent.—Scantlebury v. Tallcott, 146 N. Y. Supp. 184.

68.——Revocation.—A power of attorney, when revoked by a writing of equal solemnity, cannot be reinstated by a mere oral declaration.—People v. Tufts, Cal., 139 Pac. 78.

69. **Principal and Surety**—Guaranty.—A contract of suretyship differs from a guaranty in that the consideration of the latter is a benefit flowing to the guarantor. John Church Co. v. Aetna Indemnity Co., Ga., 80 S. E. 1093.

70. **Reformation of Instruments**—Misunderstanding.—Mere misunderstanding of facts is not a sufficient ground for reformation of a written contract.—Britton v. Metropolitan Life Ins. Co. of New York., N. C., 80 S. E. 1072.

71. **Religious Societies**—Pewholder.—Where a pewholder is deprived of his pew for convenience or from expediency and not from necessity, his remedy is by an action at law for damages.—Witthaus v. St. Thomas's Church in City and County of New York, 146 N. Y. Supp. 279.

72. **Sales**—Return of Property.—In an action on a note given for the price of machinery, where the property was returned under the contract, defendant was entitled to a credit for the reasonable value of the property when it was returned to plaintiff.—Wade v. Ray, Okla., 139 Pac. 116.

73.——Waiver.—Where refusal to accept goods bought is based solely on a specifically stated objection, all other objections are deemed waived.—Linger v. Wilson, W. Va., 80 S. E. 1108.

74. **Specific Performance**—Denial of.—The vendor will not be denied specific performance of a contract for the sale of land merely because it can be sold on the market for the contract price.—Waratah Oil Co. v. Reward Oil Co., Cal. 139 Pac. 91.

75. **Street Railways**—Collision.—Plaintiffs, in an action for injury from collision of an electric car with the automobile in which they were riding, need not show it was registered; but it is matter of defense, to prove by defendant, that it was being operated without being registered.—Conroy V. Mather, Mass., 104 N. E. 487.

76. **Vendor and Purchaser**—Cancellation of Contract.—That a vendor knowingly misrepresents a material fact, and the purchaser relies on such misrepresentation, is ground of cancellation of a contract for the purchase of land.—Riverside Inv. Co. v. Gibson, Fla., 64 So. 439.

77.——Marketable Title.—Where vendor insists on the vendee taking a doubtful title, though the contract provides that he shall give vendee a "good and sufficient warranty deed," the vendee may rescind the contract.—Boyd v. Boley, Idaho, 139 Pac. 139.

78.——Property cannot be conveyed, free from prior equities, back to a former owner who is charged with notice of such equities.—Rogis v. Barnatowich, R. I., 89 Atl. 838.

79. **Wills**—Contest.—The executor of a will whose probate is being contested must be made a defendant, because he has a right and an interest created by the will.—Doran v. Herod, Ind., 104 N. E. 385.

80.——En Ventre Sa Mere.—A child en ventra sa mere will be considered in being the time of its conception if it will be for its benefit to so consider it.—Norton v. Mortensen, Conn., 89 Atl. 882.

81.——Equity.—As an exception to the general rule that the jurisdiction of equity extends to every case of fraud, equity has no jurisdiction to determine the validity of a will alleged to have been obtained by fraud, and no power to set aside the probate thereof on that ground.—In re Hoscheid's Estate, Wash., 139 Pac. 61.

82.——Particular Estate.—Where a will devises one or more particular estates with a limitation over to children, with the right of enjoyment or possession postponed, in absence of a clear contrary intent, such interest will vest in the children as a class immediately upon testator's death, but will include those of the class coming into being before the time of enjoyment or distribution arrives.—Bartram v. Powell, Conn., 89 Atl. 885.